

Contents

Preface	xxiii
Acknowledgments	xxvii
The Constitution of the United States	xxxi
Articles of Confederation	xlix
Chart of Supreme Court Justices	lvi

PART I: INTRODUCTION: THE FOUNDATION OF MODERN CONSTITUTIONAL LAW

Chapter 1: The Founding 3

A. The Origins of the Constitution 3

1. The Declaration of Independence 4
 - a. Popular Sovereignty, the Social Compact, and the State of Nature 12
 - b. The Separation of Powers 17
 - c. Natural Rights as a Constraint on Government 18
 - d. What Are Natural Rights? 19
2. The Origin of American Federalism 21
 - a. Speech by Governor Thomas Hutchinson to the Massachusetts General Court 22
 - b. Answer of the Council to the Speech of Governor Hutchinson, of January Sixth 24
 - c. Answer of the Council to the Speech of Governor Hutchinson, of February Sixteenth 25
3. The Agency Theory of Government 26
4. The Articles of Confederation 27
5. Drafting and Ratifying the Constitution 29
 - a. The Virginia Plan 29
 - b. The New Jersey Plan 30
 - c. Hamilton's Plan 30

- d. The “Great Compromise” over Representation 30
- e. Ratification of the Constitution 31
- 6. *The Federalist Papers* 32
 - a. *Federalist No. 10: The Problem of Faction* 33
James Madison, *Federalist No. 10* 33
 - b. *Federalist No. 78: The Judicial Duty to Declare Unconstitutional Laws to Be Void* 38
Alexander Hamilton, *Federalist No. 78* 39
 - c. *Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments* 42
James Madison, *Federalist No. 51* 43
- B. The Origins of the Bill of Rights 46**
 - 1. Federalist Objections to a Bill of Rights 47
 - a. James Wilson, Speech in the Statehouse Yard, Philadelphia 48
 - b. James Wilson, Speeches to the Pennsylvania Ratification Convention 49
 - c. James Wilson, Speeches to the Pennsylvania Ratification Convention 49
 - d. James Iredell, Speech to the North Carolina Ratification Convention 49
 - 2. The Anti-Federalist Reply 50
Brutus II, *The New York Journal* 50
 - 3. James Madison Delivers on the Promise of Amendments 52
Madison’s Speech to the House Introducing Amendments 52
 - 4. The Original Meaning of the Phrase “Rights . . . Retained by the People” in the Ninth Amendment 60
- C. The Scope of Congressional Power: The Debate over the First National Bank 64**
 - 1. James Madison, Speech in Congress Opposing the National Bank 66
 - 2. Opinion of Attorney General Edmund Randolph 69
 - 3. Opinion of Secretary of State Thomas Jefferson 71
 - 4. Opinion of Secretary of the Treasury Alexander Hamilton 73
- D. Fundamental Principles vs. Expressed Constraints 77**
Calder v. Bull 79
- E. Did the “Bill of Rights” Apply to the States? 82**
Barron v. City of Baltimore 84

Chapter 2: Slavery and the Constitution 89

- A. The Development of Slavery in America from 1619 to 1787 90**
- B. The Constitution’s Three Primary Concessions to Slavery 91**
 - 1. The First Compromise over Slavery: The Three-Fifths Clause 91
 - 2. The Second Concession to Slavery: The Slave Trade Clause 92

3. The Third Concession to Slavery: The Fugitive Slave Clause 94
 4. Antislavery Delegates Held the Line and Rejected the Concept of “Property in Man” 95
 5. Why Compromise with Slaveholders? 96
 6. The Growth of Slavery and Proslavery Ideology *After* Ratification 97
 - a. Radical Abolitionists 98
 - b. Political Abolitionists 98
 - c. Constitutional Abolitionists 99
- C. The Fugitive Slave Act of 1793 100**
1. Salmon P. Chase Argued That the Fugitive Slave Act Was Unconstitutional 100
 Speech of Calmon P. Chase, in the Case of the Colored Woman, Matilda, Who Was Brought Before the Court of Common Pleas of Hamilton County, Ohio, by Writ of Habeas Corpus 101
 2. The Taney Court Upheld the Constitutionality of the Fugitive Slave Act 106
Prigg v. Pennsylvania 108
 3. Constitutional Abolitionism: Rejecting the Framers’ Intent 113
 4. The Constitutional Abolitionists Respond to *Prigg* 116
 Lysander Spooner, A Defense for Fugitive Slaves Against the Acts of Congress of February 12, 1793 117

Chapter 3: Slavery, Citizenship, and the Due Process of Law 121

- A. Slavery and the Due Process of Law 121**
- B. *Dred Scott v. Sandford* 124**
Dred Scott v. Sandford 128
- C. Constitutional Abolitionism and the *Dred Scott* Decision 149**
1. Frederick Douglass, Speech Delivered, in Part, at the Anniversary of the American Abolition Society, Held in New York 150
 2. Frederick Douglass, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?, Speech Delivered in Glasgow, Scotland 154
- D. The Aftermath of *Dred Scott v. Sandford* 155**

Chapter 4: The Reconstruction Amendments 159

- A. The Adoption of the Reconstruction Amendments 160**
1. The Thirteenth Amendment and the Civil Rights Act of 1866 160
 2. The Fourteenth Amendment 164
 - a. The Citizenship Clause 164
 - b. The Privileges or Immunities Clause 164
 - c. The Due Process of Law Clause 164
 - d. The Equal Protection Clause 164
 - e. Section 5 of the Fourteenth Amendment: The Enforcement Clause 165

3. The Fifteenth Amendment 165
- B. What Did the “Privileges or Immunities of Citizens of the United States” Protect? 170**
1. The History of the Privileges or Immunities Clause 170
 - a. Privileges and Immunities and *Corfield v. Coryell* 170
 - b. Privileges and Immunities and Slavery 172
 - c. Privileges and Immunities and *Dred Scott* 174
 - d. The Privileges or Immunities Clause of the Fourteenth Amendment 175
 2. The Supreme Court Deletes the Privileges or Immunities Clause from the Constitution 176
 - The Slaughter-House Cases* 177
 - Bradwell v. State of Illinois* 193
 3. Did the Privileges or Immunities Clause Protect Enumerated Rights from State Abridgement? 196
 - United States v. Cruikshank* 199
 - McDonald v. City of Chicago* 203
 4. Did the Privileges or Immunities Clause Protect Unenumerated Rights from State Infringement? 215
- C. The Enforcement Powers of the Thirteenth and Fourteenth Amendments 219**
1. Congress’s Enforcement Powers and the Civil Rights Act of 1875 219
 - Strauder v. West Virginia* 222
 - The Civil Rights Cases* 231
 2. The Supreme Court’s Modern Approach to Congress’s Enforcement Powers 247
 - Katzenbach v. Morgan* 248
 - United States v. Morrison* 251
- D. Defining the Due Process and Equal Protection Clauses of the Fourteenth Amendment 254**
1. What Is the Original Meaning of the “Due Process of Law” and the “Equal Protection of the Law”? 254
 - a. “The Due Process of Law” 254
 - b. The Equal Protection of the Laws Clause 256
 2. The Due Process and Equal Protection Clauses Can Both Bar Racial Discrimination 258
 - Yick Wo v. Hopkins* 259
 3. The “Separate but Equal” Doctrine 262
 - Plessy v. Ferguson* 264

Chapter 5: Expanding the Scope of the Due Process Clause 275

- A. The Due Process Clause During the Progressive Era 276**
1. Two Ways to Approach the Due Process Clause 276

2. Extending Fundamental Rights to the States Through the Due Process Clause 277
 - Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* 278
 3. “Economic” Liberty in the Progressive Era 282
 - Lochner v. People of the State of New York* 283
 - Muller v. State of Oregon* 297
 - Buchanan v. Warley* 301
 - Adkins v. Children’s Hospital of the District of Columbia* 306
 4. “Personal” Liberty in the Progressive Era 312
 - Meyer v. State of Nebraska* 313
 - Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* 317
 - Buck v. Bell* 321
- B. From the Presumption of Liberty to the Presumption of Constitutionality 326**
1. “Economic” Liberty Before the New Deal 327
 - O’Gorman & Young, Inc. v. Hartford Fire Insurance Co.* 329
 - Nebbia v. People of State of New York* 332
 2. “Economic” Liberty Before and After 1937 338
 - West Coast Hotel Co. v. Parrish* 339
- C. Qualifying the Presumption of Constitutionality 346**
- United States v. Carolene Products Co.* 347
 - A Footnote to Footnote Four 351
 - Footnote Four and “Representation Reinforcement” 354
 - John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 355
- D. The Irrebuttable Presumption of Constitutionality After the New Deal 356**
1. The Federal District Court in *Lee Optical* Applies the Rebuttable Presumption of Constitutionality 356
 - Lee Optical of Oklahoma v. Williamson* 357
 2. The Warren Court Makes the Presumption of Constitutionality Virtually Impossible to Rebut 362
 - Williamson v. Lee Optical of Oklahoma* 363
 3. A Brief History of the Supreme Court’s Approaches to the Due Process Clause 365
 4. The Filled Milk Act Is Finally Declared Unconstitutional 365
 - Milnot Company v. Richardson* 366
- E. What About the Ninth Amendment? 369**
1. James Madison and the Ninth Amendment 369
 2. The Supreme Court Dismisses the Ninth Amendment 370
 - United Public Workers v. Mitchell* 371
 3. The Ninth Amendment, Ghosts, and Ink Blots 371

PART II: EQUAL PROTECTION OF THE LAW

Chapter 6: Equal Protection of the Law: Discrimination on the Basis of Race 377

A. Rejecting “Separate but Equal” 378

1. Racial Discrimination by State Governments 378
Brown v. Board of Education of Topeka 381
2. Racial Discrimination by the Federal Government 385
Bolling v. Sharpe 386
Brown v. Board of Education of Topeka (Brown II) 389
3. The Massive Resistance to *Brown* 391
Cooper v. Aaron 394
4. Can *Brown* Be Reconciled with Original Meaning? 398
Michael W. McConnell, Originalism and the Desegregation Decisions 399
Michael J. Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell 406
Michael W. McConnell, The Originalist Justification for *Brown*: A Reply to Professor Klarman 409
5. Racial Classifications That Apply Equally to All Races 413
Loving v. Virginia 413
6. The Three Tiers of Scrutiny Under the Equal Protection Clause 417
7. Is There Discriminatory Intent or a Discriminatory Impact? 418
Washington v. Davis 419

B. Affirmative Action 422

1. Admission to School 423
Regents of the University of California v. Bakke 424
An Act to Establish a Bureau for the Relief of Freedmen and Refugees 436
Grutter v. Bollinger 437
Gratz v. Bollinger 448
Fisher v. University of Texas at Austin (Fisher II) 455
2. Employment 464
Adarand Constructors v. Peña 464

Chapter 7: Equal Protection of the Law: Sex Discrimination and Other Types 475

A. Sex Discrimination and Intermediate Scrutiny 476

- Frontiero v. Richardson* 477
Craig v. Boren 482
United States v. Virginia 487

- B. Other Types of Discrimination and “Heightened” Rational Basis Scrutiny 500**
Cleburne v. Cleburne Living Center, Inc. 501
Romer v. Evans 508

PART III: LIBERTY

Chapter 8: Modern Substantive Due Process 521

- A. Protecting the Unenumerated Right of Privacy 521**
Griswold v. Connecticut 524
Roe v. Wade 540
- B. Two Approaches to Protect Liberty Under the Due Process Clauses 551**
1. The “Fundamental Rights” Doctrine 551
Bowers v. Hardwick 552
Washington v. Glucksberg 559
Troxel v. Granville 564
 2. Protecting “Liberty” and “Dignity” 566
Planned Parenthood of Southeastern Pennsylvania v. Casey 568
Washington v. Glucksberg 584
Gonzales v. Carhart 586
Whole Woman’s Health v. Hellerstedt 590
Lawrence v. Texas 600
- From the Defense of Marriage Act to Same-Sex Marriage: *United States v. Windsor* 616
Obergefell v. Hodges 620

PART IV: THE FIRST AMENDMENT

Chapter 9: Freedoms of Speech and Press 645

- A. The Origin of Free Speech Doctrine 646**
1. Sedition and the Original Meaning of the First Amendment 646
The Virginia Resolution 648
The Kentucky Resolution 650
 2. The Bad Tendency Test 654
Schenck v. United States 655
Debs v. United States 657
Abrams v. United States 660
Gitlow v. People of State of New York 663
Stromberg v. California 668

3. Unprotected Speech 669
 - Chaplinsky v. New Hampshire* 669
 4. The Imminent Lawless Action Test 671
 - Brandenburg v. Ohio* 672
- B. What Constitutes “Speech”? 675**
1. When Is Conduct Speech? 675
 - United States v. O’Brien* 676
 - Texas v. Johnson* 679
 - R.A.V. v. City of St. Paul* 685
 2. Does Money Equal Speech? 690
 - Buckley v. Valeo* 691
 - McConnell v. Federal Election Commission* 693
 - Citizens United v. Federal Election Commission* 696
- C. What Constitutes “Abridging” the Freedom of Speech? 715**
1. How Can the Government Regulate the Time, Place, and Manner of Speech? 716
 - Ward v. Rock Against Racism* 716
 2. Does the First Amendment Ever Protect Speech That Is Tortious? 719
 - New York Times Co. v. Sullivan* 721
 - Gertz v. Robert Welch, Inc.* 727
 - Snyder v. Phelps* 731
 3. Is the Press Exempt from General Laws? 741
 - Branzburg v. Hayes* 741
 - Cohen v. Cowles Media Co.* 746
 4. May the Government Mandate Access to the Press? 748
 - Red Lion Broadcasting Co. v. Federal Communications Commission* 749
 - Miami Herald v. Tornillo* 755
- D. Is Some Speech Less Worthy of Protection? 757**
1. “Obscene” and Sexually Explicit Speech 757
 - Stanley v. Georgia* 758
 - Miller v. California* 761
 - Ashcroft v. Free Speech Coalition* 765
 2. Other Forms of “Offensive” Speech 772
 - United States v. Stevens* 773
 - Brown v. Entertainment Merchants Association* 782
 3. Commercial Speech 796
 - Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 797
 - Central Hudson Gas & Electric Corp. v. Public Service Commission* 800
 - Lorillard Tobacco v. Reilly* 803
 - National Institute of Family and Life Advocates v. Becerra* 809

Chapter 10: Freedom of Association 819

A. Compulsory Disclosure of Membership 819

- NAACP v. Alabama* 820
- Buckley v. Valeo* 823
- McConnell v. Federal Election Commission* 825
- Americans for Prosperity Foundation v. Bonta* 826

B. Compulsory Expression 842

- Abood v. Detroit Board of Education* 842
- Janus v. American Federation of State, County, and Municipal Employees, Council 31* 845

C. Compulsory Association 856

- Roberts v. United States Jaycees* 857
- Boy Scouts of America v. Dale* 867

Chapter 11: The Free Exercise of Religion 877

A. Belief vs. Conduct 877

- Reynolds v. United States* 878

B. Generally Applicable Laws That Burden the Free Exercise of Religion 883

- Sherbert v. Verner* 884
- Employment Division, Department of Human Resources of Oregon v. Smith* 886
- Church of the Lukumi Babalu Aye v. City of Hialeah* 890
- Trinity Lutheran Church v. Comer* 896
- Espinoza v. Montana Department of Revenue* 902

C. Congress Responds to *Employment Division v. Smith* 923

Chapter 12: No Law Respecting an Establishment of Religion 925

A. The Establishment Clause on the Burger Court 927

- Lemon v. Kurtzman* 928
- Marsh v. Chambers* 932
- James Madison, The Detached Memorandum 934

B. The Establishment Clause on the Rehnquist Court 936

- Lee v. Weisman* 936
- McCreary County, Kentucky v. ACLU of Kentucky* 947
- Van Orden v. Perry* 957

C. The Establishment Clause on the Roberts Court 961

- Town of Greece v. Galloway* 962
- The American Legion v. American Humanist Association* 972

PART V: THE SECOND AMENDMENT

Chapter 13: The Right to Keep and Bear Arms 987

- A. Does the Second Amendment Protect an Individual Right? 989**
 - District of Columbia v. Heller* 991
- B. Does the Right to Keep and Bear Arms Apply to States? 1009**
 - McDonald v. City of Chicago* 1011
- C. The Right to Keep and Bear Arms in the Lower Courts 1031**
 - Ezell v. City of Chicago* 1031
 - Kanter v. Barr* 1037
- D. The Right to Keep and Bear Arms in the Supreme Court 1053**
 - New York State Rifle & Pistol Association, Inc. v. City of New York, New York* 1054
 - Rogers v. Grewal* 1060

PART VI: THE FOURTH, FIFTH, AND SIXTH AMENDMENTS

Chapter 14: The Rights of the Accused 1073

- A. The Rights of the Accused on the Warren Court 1075**
 - Mapp v. Ohio* 1076
 - Gideon v. Wainwright* 1083
 - Miranda v. Arizona* 1087
 - Katz v. United States* 1102
 - Terry v. Ohio* 1110
- B. The Rights of the Accused on the Burger Court 1117**
 - United States v. Leon* 1119
- C. The Rights of the Accused on the Rehnquist Court 1124**
 - United States v. Dickerson* 1125
 - Dickerson v. United States* 1126
 - Kyllo v. United States* 1134
 - Crawford v. Washington* 1141
- D. The Rights of the Accused on the Roberts Court 1150**
 - United States v. Jones* 1151
 - Carpenter v. United States* 1158
 - William Baude & James Y. Stern, The Positive Law Model of the Fourth Amendment 1181

PART VII: THE SECOND AMENDMENT

Chapter 15: Taking Private Property for Public Use 1191

A. What Is a “Taking”? 1192

Pennsylvania Coal Co. v. Mahon 1193

Murr v. Wisconsin 1197

Cedar Point Nursery v. Hassid 1204

B. What Is a “Public Use”? 1217

Kelo v. City of New London 1218

Table of Cases 1233

Index 1237